No. 08-1300

Supreme Court, U.S.
FILED
JUN 22 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DR. CLARK GUNDERSON AND
LAKE CHARLES MEMORIAL HOSPITAL,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

JUDY Y. BARRASSO
Counsel of Record
EDWARD R. WICKER, JR.
STEPHEN L. MILES
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, LA 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701
Attorneys for Respondent, Liberty Mutual Insurance Company

June 22, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Liberty Mutual Insurance Company, is wholly owned by Liberty Mutual Group, Inc. LMHC Massachusetts Holdings, Inc. wholly owns the stock of Liberty Mutual Group, Inc. Liberty Mutual Holding Company, Inc. wholly owns the stock of LMHC Massachusetts Holdings, Inc. No publicly traded entity owns any stock of any of these entities.

TABLE OF CONTENTS

Page

RULE 29.6 DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

1. Statement of the Facts 2

2. Course of Proceedings and Disposition in the Courts Below 3

REASONS FOR DENYING THE WRIT 5

1. Subject Matter Jurisdiction Exists For Liberty Mutual's Claims 5

2. The Petitioners' Abstention Argument Is Waived And Does Not Warrant Review 11

3. The Petitioners' Due Process Rights Were Not Infringed 16

CONCLUSION 18

APPENDIX ..... App. 1

April 12, 2006 Amended Judgment of District Court ..... App. 1

October 6, 2006 Fifth Circuit Ruling Dismissing Appeals ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Albe v. La. Workers' Compensation Corp., 700 So. 2d 824 (La. 1997).....9

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).....4

Dial v. Hartford Accident & Indem. Co., 863 F.2d 15 (5th Cir. 1989).....8

Gunderson v. F.A. Richard & Assocs., Inc., 977 So. 2d 1128 (La. App. 3d Cir. 2008).....10

Hedrick ex rel. Adams v. Tex. Workers Compensation Comm'n, 54 Fed. Appx. 592 (5th Cir. 2002).....8

Horton v. Liberty Mutual Insurance Company, 367 U.S. 348 (1961).....*passim*

Kay v. Home Indem. Co., 337 F.2d 898 (5th Cir. 1964).....11

Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70 (1955).....14

Ryder Servs. Corp. v. Savage, 945 F. Supp. 232 (N.D. Ala. 1996).....8

Sentry Ins. Co. v. Southwest La. Hosp., No. 06-570 (W.D. La. 06/04/08).....9, 10

Sherwin-Williams Co. v. Holmes County, 343 F.3d 383 (5th Cir. 2003).....14-15

St. Paul Ins. Co. v. Trejo, 39 F.3d 585 (5th Cir. 1994).....14, 15

TABLE OF AUTHORITIES – Continued

Page

State Farm Fire & Cas. Co. v. Odom, 799 F.2d 247 (6th Cir. 1986) 15

Taylor v. Sturgell, ___ U.S. ___, 128 S. Ct. 2161 (2008) 16

Tomas v. Conco Food Distribs., 666 So. 2d 327 (La. App. 3d Cir. 1995) 9

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 12, 13, 17

United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488 (4th Cir. 1998) 15

Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172 (1965) 11

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a)(1) 12

28 U.S.C. § 1330 6

28 U.S.C. §§ 1341-42 6

28 U.S.C. § 1445(c) 5, 8

28 U.S.C. § 1651 13

28 U.S.C. § 2283 13

U.S. Const. art. I, § 10 3-4

U.S. Const., amend. XIV, § 1 4

Supreme Court Rule 10(a), (c) 1, 14

La. Const. art. V, § 16(A) 9

TABLE OF AUTHORITIES – Continued

Page

La. Rev. Stat. 23:1310.3(E) 9

La. Rev. Stat. 40:2201 3

La. Rev. Stat. 40:2203.1 10

LIBERTY MUTUAL'S BRIEF IN OPPOSITION

Liberty Mutual Insurance Company[1] requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the Opinion of the Court of Appeals for the Fifth Circuit, Docket No. 08-30075, which summarily affirmed the Judgment of United States District Court Judge James Trimble of the Western District of Louisiana, Docket No. 04-2405.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), because there neither is an important federal question involved nor does the Fifth Circuit's opinion or that of the District Court conflict with any decision of this Court. *See* Supreme Ct. R. 10(a) and (c). Moreover, as discussed herein, Lake Charles Memorial Hospital and Clark Gunderson, M.D. ("Petitioners") seek to have this Court resolve issues that were not determined by, or even raised before, the Fifth Circuit. These issues should not be reviewed by this Court in the first instance. The Petition should be denied on this basis alone.

[1] Hereinafter, Liberty Mutual Insurance Company, Respondent herein, will be referred to as Liberty Mutual.

STATEMENT OF THE CASE

1. Statement of the Facts

In January 2001, Liberty Mutual entered into an agreement with First Health Group Corp. ("First Health"), whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers ("PPO Contract"). Those hospitals and medical providers, including the Petitioners here, entered into Provider Agreements[2] with First Health for the delivery of medical services at discounted rates to insureds/customers of Liberty Mutual. The organization resulting from the various Provider Agreements is commonly referred to as a Preferred Provider Organization ("PPO"). The discounted medical services include, but are not limited to, services on account of work-related injuries sustained by employees of the insureds/employers of Liberty Mutual.

Specifically, the Petitioners agreed in their Provider Agreements to accept the reimbursement amounts as payment in full for medical services, including medical services performed in connection with workers' compensation claims. Although for years the Petitioners reaped the benefits of the Provider Agreements and were paid by Liberty Mutual without objection the bargained-for, discounted rates in accordance with the Provider

---

[2] Liberty Mutual is a third party beneficiary to the Provider Agreements.

Agreements and the PPO Contract, the Petitioners sought additional monies for their services, penalties, and attorneys' fees, and have asserted a barrage of claims against Liberty Mutual with the Louisiana Office of Workers' Compensation ("OWC") arising out of alleged underpayments. Despite the clear language of their Provider Agreements, the Petitioners contend that the payment provision of their Provider Agreements is null and void under the Any Willing Provider Act, La. Rev. Stat. 40:2201 *et seq.* (hereinafter "Title 40"), and Louisiana's workers' compensation laws, and that they are entitled to additional monies for medical services on workers' compensation claims, together with penalties and attorneys' fees.

2. Course of Proceedings and Disposition in the Courts Below

In light of the Louisiana OWC claims brought by the Petitioners and the threat of many others, Liberty Mutual, on November 23, 2004, instituted this declaratory judgment and breach of contract action against the Petitioners, seeking to have the Petitioners honor their own Provider Agreements, and to recover damages for their failure and refusal to do so. Liberty Mutual also alleged violations of the United States Constitution.[3] Liberty Mutual then sought

---

[3] The constitutional claims are that (1) application of Title 40, as interpreted by the Petitioners, to Provider Agreements entered into before Title 40's enactment effectively nullifies such contracts in violation of the Contracts Clause, U.S. Const. art. I,

(Continued on following page)

summary judgment declaring that the Provider Agreements were enforceable under Louisiana law, and therefore neither of the Petitioners was entitled to be paid additional sums under the contracts, nor penalties and attorneys' fees. On February 15, 2006, the District Court granted Liberty Mutual's Motion for Summary Judgment, enforcing the Provider Agreements of the Petitioners, and finding meritless their arguments that the agreements were invalid under Title 40 or under Louisiana workers' compensation laws. The District Court certified this ruling for immediate appeal on April 12, 2006. Rather than argue the merits of the summary judgment, the Petitioners instead chose to raise only jurisdictional (and abstention) issues in the Fifth Circuit, which correctly dismissed the appeal on October 3, 2006.

In spite of the District Court's summary judgment, the Petitioners continued to file and pursue claims against Liberty Mutual in the Louisiana OWC seeking alleged underpayments, penalties, and attorneys' fees. On the motion of both Liberty Mutual and First Health, the District Court, on November 30, 2007, enjoined the Petitioners from bringing and/or pursuing claims against First Health, including those

---

§ 10; and, (2) imposition of the penalties imposed by Title 40 – fifty dollars per day *ad infinitum* regardless of the alleged compensatory damages, which are minimal in most cases – would be in violation of the Due Process Clause of the Fourteenth Amendment pursuant to *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-83 (1996).

payors/insurers with whom it contracted, like Liberty Mutual, involving the enforceability of the Provider Agreements. The Petitioners appealed only a limited portion of that ruling, choosing not to contest the injunction in favor of Liberty Mutual; the Petitioners specifically limited their appeal to the injunction in favor of First Health. Pet. at 8a. The Fifth Circuit affirmed the District Court's injunction on November 25, 2008. *Id.* On the Petitioners' motion for panel rehearing, the Fifth Circuit clarified that it had subject matter jurisdiction due to diversity of citizenship. It found that, pursuant to *Horton v. Liberty Mutual Insurance Company*, 367 U.S. 348 (1961), "even if a state agency may ultimately have authority to consider claims or aspects of those claims in the first instance, this Court may properly exercise diversity jurisdiction over state worker's compensation cases." Pet. at 52a. The Petition followed.

REASONS FOR DENYING THE WRIT

1. Subject Matter Jurisdiction Exists For Liberty Mutual's Claims.

The Petitioners' first and primary argument is an attack on the lower courts' subject matter jurisdiction, based on a claim that Liberty Mutual violated 28 U.S.C. § 1445(c) when it "effectively removed" workers' compensation cases "pending against it" to federal court by "asserting its affirmative defenses in the form of a federal declaratory

action." Pet. at 13. The argument is founded on an erroneous belief that cases having anything at all to do with workers' compensation issues must be heard in a workers' compensation forum, and not by federal courts. As such, and because subject matter jurisdiction exists for Liberty Mutual's claims, review is not warranted.

The starting point for determining the scope of the jurisdiction conferred upon federal courts is the jurisdictional statutes themselves. *See* 28 U.S.C. § 1330, *et seq*. Notably, although the jurisdictional statutes do limit the federal courts' original jurisdiction over state tax and ratemaking issues, *e.g.*, 28 U.S.C. §§ 1341-42, the statutes nowhere limit the federal courts' original jurisdiction over workers' compensation claims. It follows that federal courts retain original jurisdiction in diversity cases, even though they involve workers' compensation claims. Indeed, this Court has agreed, expressly holding that original federal jurisdiction is not precluded because a case involves a workers' compensation award. *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 350-54 (1961). Relying on the jurisdictional statutes, this Court in *Horton* held that a federal court had original jurisdiction over a case challenging a workers' compensation award and requiring a *de novo* determination in federal court of the amount to be awarded because the statutes did not expressly preclude such jurisdiction. *See id.* The Court explained:

> Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still.

Id. at 352. Because Liberty Mutual's claims against the Petitioners meet the diversity of citizenship and amount in controversy requirements – a point no longer in dispute – the Fifth Circuit and District Court correctly applied *Horton* and found original jurisdiction over this case involving the enforceability of the Provider Agreements and PPO Contract, even though the case also involves workers' compensation laws.[4]

---

[4] The Petitioners' view of *Horton* is unclear. In one instance, they assert that the present case is "distinguishable" from *Horton* (Pet. at 15), and, in another, that application of *Horton* here would improperly "[e]xpand[ ] its holding" (*id.* at 16). In still another instance, they cite approvingly the *Horton* dissent, suggesting that the case should be overturned (*id.* at 17). No matter the Petitioners' view, the holding of *Horton* that federal

(Continued on following page)

In the face of these controlling precedents, the Petitioners solely turn to non-controlling, unpersuasive authorities. For example, *Dial*[5] and *Hedrick*[6] (Pet. at 16-17) involve the requirement in certain cases of exhaustion of administrative remedies in the OWC, but that is not an issue in this lawsuit. Moreover, *Ryder*[7] (*id.* at 18) ignored the controlling Supreme Court authority expressly holding that a federal court does have original jurisdiction over a workers' compensation claim, and concluded to the contrary. In so holding, the *Ryder* court relied upon the argument that the prohibition in 28 U.S.C. § 1445(c) against removal of workers' compensation claims translates into a prohibition against the exercise of original jurisdiction, an argument flatly rejected by this Court in *Horton*. The Fifth Circuit and District Court correctly refused to defer to *Ryder* and the other cases cited by the Petitioners.

The Petitioners' argument against federal jurisdiction also fails because Liberty Mutual's claims

---

courts have original jurisdiction over cases involving workers' compensation laws, which is based on sound statutory interpretation, remains on strong footing and is applicable to this case, especially given that the existence of diversity jurisdiction is no longer in dispute.

[5] *Dial v. Hartford Accident & Indem. Co.*, 863 F.2d 15 (5th Cir. 1989).

[6] *Hedrick ex rel. Adams v. Tex. Workers Compensation Comm'n*, 54 Fed. Appx. 592 (5th Cir. 2002) (per curiam).

[7] *Ryder Servs. Corp. v. Savage*, 945 F. Supp. 232 (N.D. Ala. 1996).

could not have been brought in the OWC; accordingly, they were not, and could not have been, "effectively removed," as the Petitioners contend. The Louisiana OWC has jurisdiction only to "adjudicate workers' substantive claims." *See* La. Const. art. V, § 16(A); *see also Albe v. La. Workers' Compensation Corp.*, 700 So. 2d 824, 829 (La. 1997) (Louisiana Constitution only authorizes OWC to "adjudicate workers' substantive claims arising under the [Workers' Compensation] Act"). Here, Liberty Mutual's breach of contract claim is not a "workers' substantive claim." Indeed, no workers are even parties to the action. Nor is this case merely a declaratory judgment action concerning claims currently pending in the OWC. To the contrary, Liberty Mutual brought claims for breach of contract, as well as for constitutional violations, which the Petitioners conveniently omit from their Petition. The OWC has no jurisdiction to hear either claim. *See Tomas v. Conco Food Distribs.*, 666 So. 2d 327, 330 (La. App. 3d Cir. 1995) (OWC has no authority to hear claims of constitutional violations); *see also* La. Rev. Stat. 23:1310.3(E) (conferring OWC jurisdiction over certain "claims or disputes" arising out of the Workers' Compensation Act, but not over breach of contract claims by insurers against providers).[8]

---

[8] The Petitioners' reference to *Sentry Ins. Co. v. Southwest La. Hosp.*, No. 06-570 (W.D. La. 06/04/08) – and claim that the District Court somehow had a "change of heart" on *Horton* in that case (Pet. at 18-19) – is misleading. In *Sentry*, the District

(Continued on following page)

Further, Liberty Mutual seeks a declaration concerning Title 40, which heaps ruinous penalties upon those found to be "group purchasers," as statutorily defined, when they fail to issue so-called benefit cards or provide written notice that a medical bill will be discounted pursuant to a PPO agreement. The OWC has no jurisdiction to hear such a claim. *See Gunderson v. F.A. Richard & Assocs., Inc.*, 977 So. 2d 1128, 1135-36 (La. App. 3d Cir.) ("[W]e now hold that a claim brought pursuant to La. R.S. 40:2203.1 for failure to comply with provisions of that statute arises out of [Title 40] and not the [Workers Compensation Act]. . . . As with all other civil or criminal matters not specifically excepted by either the constitution or legislation, original jurisdiction of such claims lies properly with the district court."), *writs denied*, 992 So. 2d 953 (La. 2008). That Title 40 claims cannot be heard in the OWC is confirmed by the actions of the Petitioners themselves, who have prosecuted such a claim in Louisiana district court – not the OWC – against First Health, also a party to this case. The Petitioners should not be heard to argue that their dispute with Liberty Mutual can only be considered in the OWC, while at the same

---

Court expressly distinguished the jurisdictional issues present in the instant case, given that both cases contain different causes of action. Pet. at 59a. In any event, the District Court's finding in *Sentry*, which has not even been reviewed by the Fifth Circuit, does not require this Court to provide "guidance . . . on this [*Horton*] issue." Pet. at 19.

time they litigate the same claims in a Louisiana district court.

Because the Title 40, constitutional, and contract damages claims in this action cannot be brought in the OWC,[9] those claims never were, or even could have been, "removed" from the OWC by Liberty Mutual.[10] Under *Horton*, as the Fifth Circuit and District Court properly held, federal jurisdiction is proper over this lawsuit.

2. The Petitioners' Abstention Argument Is Waived And Does Not Warrant Review.

The Petitioners next contend that the District Court "lacked authority to render the summary judgment under policies of federalism embodied in

---

[9] Because the OWC lacks jurisdiction to hear central claims in this lawsuit, the Petitioners' reliance on *Kay v. Home Indem. Co.*, 337 F.2d 898 (5th Cir. 1964), which they claim requires the OWC to make an "ultimate authoritative determination" in certain circumstances, should be ignored. Pet. at 17.

[10] By the same token, Liberty Mutual's declaratory judgment action concerns the validity of the very contracts themselves, as well as all pending *and potential* claims by the Petitioners related to discounts on medical bills taken pursuant to the Provider Agreements and PPO Contract, which claims have been or will be filed by the Petitioners in the future. Suits that have been threatened but that have not been filed may properly be the subject of a declaratory judgment action, *see Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176 (1965) (one need not await the filing of a threatened suit to seek relief under the Declaratory Judgment Act), but obviously cannot be removed.

the Anti-Injunction Act." Pet. at 20. The flaws in this argument are myriad.

First, the Petitioners have lost track of the issues presented below. Pursuant to the statutory grant of appellate jurisdiction for interlocutory review of permanent injunctions, *see* 28 U.S.C. § 1292(a)(1), the Petitioners sought review of an order permanently enjoining them from bringing claims against First Health or its payors, including Liberty Mutual. The Petitioners, however, did not appeal the injunction with respect to Liberty Mutual, choosing instead to limit their appeal to the injunction as to First Health and its other payors. The Fifth Circuit made this fact clear in its ruling. *See* Pet. at 2. (Petitioners only appealed "portion of injunction which enjoins claims against First Health and its 'unidentified payors,'" and did "not appeal the permanent injunction applicable to claims against Liberty Mutual"). Since the Petitioners chose not to appeal the injunction with respect to Liberty Mutual in the Fifth Circuit, they cannot now raise the issue in this Court. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 n.5 (1985) (issues not raised below are waived).

Moreover, just as the Fifth Circuit never considered the injunction with respect to Liberty Mutual, the Fifth Circuit also never considered the underlying basis of the injunction – *i.e.*, the summary judgment in favor of Liberty Mutual years earlier by the District Court on legal issues involving Louisiana law. *See* Pet. at 34a. The summary judgment was rendered on February 15, 2006 (*id.*), and the District

Court certified the legal issues for immediate appeal. App. 1. Rather than appeal the merits of the summary judgment, the Petitioners instead chose to raise only jurisdictional (and abstention) issues in the Fifth Circuit, which correctly dismissed the appeal on October 3, 2006. App. 4. These events were long before the District Court issued its permanent injunction in November 2007 (Pet. at 17a) and the Fifth Circuit affirmed in November 2008. *Id.* at 1a.

Accordingly, the Petitioners' complaints to this Court regarding the propriety of the summary judgment are improper because the Fifth Circuit never considered – or was even asked to consider – the summary judgment. The Petitioners' complaints regarding abstention are equally improper because such arguments never were presented by the Petitioners to the Fifth Circuit as part of their appeal of the permanent injunction that is at issue here. *See Hallie*, 471 U.S. at 42 n.5.[11] Petitioners' abstention arguments should not be considered.

Even if Petitioners' arguments are considered, they do not meet this Court's considerations governing review on certiorari. The Petitioners argue not that any Supreme Court precedent was ignored, but that the District Court did not properly follow the

---

[11] The District Court and Fifth Circuit instead considered whether an injunction was proper pursuant to the All Writs Act, 28 U.S.C. § 1651, and under the re-litigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The Fifth Circuit's ruling in this regard is not challenged by Petitioners.

Fifth Circuit's standard for determining the propriety of abstention under *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994), which sets forth factors for consideration whether abstention is proper in a declaratory judgment action. There also is no contention that this ruling created a conflict in the circuits. Nor is this issue an important one that has never been decided by this Court. As such, the issue presented plainly does not meet any of the considerations governing review on certiorari. *See* Sup. Ct. R. 10. Review should not be granted. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.* 349 U.S. 70, 73-74 (1955) (Court will only grant review where there are "special and important reasons" to do so).

Finally, review also is not warranted because the District Court correctly applied the *Trejo* factors in concluding abstention was improper. These factors include (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence exist; (5) whether the federal court is convenient for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and, (7) whether the federal court is called upon to construe a judicial decree entered by a state court. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 388

(5th Cir. 2003) (citing *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994)).

Here, none of the factors supports abstention. As to factor one, *Trejo* requires there be a state forum where "all of the matters in controversy may be fully litigated." *Id.* As stated previously, the OWC does not have jurisdiction to hear disputes regarding Title 40, the constitutional claims, or the breach of contract claim. *See* p. 10, *supra*. As such, there is no pending state case that could hear the issues presented. As to factors two through four, this case is not the kind that presents impermissible or unfair forum shopping. Rather, quite simply, Liberty Mutual has sought a ruling regarding the application of Title 40 and the enforceability of Provider Agreements in a forum where standard diversity principles confer jurisdiction. Nothing about this action should be construed as improper. *See, e.g.*, *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (insurance company properly initiated declaratory judgment suit to ascertain its rights); *State Farm Fire & Cas. Co. v. Odom*, 799 F.2d 247, 250 n.1 (6th Cir. 1986) (same).

Nor should this case have been dismissed because of judicial efficiency concerns. As set forth above, the dispute presented by Liberty Mutual cannot be heard in the OWC. To be sure, dismissing this case would have been inefficient because it would deprive Liberty Mutual of the four-plus years of effort that has been expended in this case, and potentially would result in the filing of additional suits to

adjudicate the Title 40 issues. As well, the Petitioners' claim that this case and the OWC cases may result in inconsistent judgments rings hollow in light of the Petitioners' recently filed counterclaims in this case joining issues regarding PPO underpayments. The Providers themselves obviously believe that all issues can be determined by this Court, thus alleviating the possibility of inconsistent rulings.

There is no merit to the Petitioners' abstention argument, and review of this case is not warranted.

3. The Petitioners' Due Process Rights Were Not Infringed.

Finally, the Petitioners argue that their due process rights somehow were violated because the District Court's injunction prohibits them from pursuing claims against "First Health's 'payors.'" Pet. at 26. In particular, the Petitioners contend, in conclusory fashion, that the prohibition against virtual representation in *Taylor v. Sturgell*, ___ U.S. ___, 128 S. Ct. 2161 (2008), was violated through the Fifth Circuit's finding that First Health's payors were in privity with Liberty Mutual and/or First Health, because Liberty Mutual did not sue the Petitioners on behalf of the unidentified payors in the First Health network in whose benefit the injunction was issued, and because the Petitioners did not receive notice that the payors would be included in the judgment in favor of Liberty Mutual.

Again, since the Petitioners chose to challenge the injunction in the Fifth Circuit with respect to First Health and not Liberty Mutual, they may not present such a challenge as to Liberty Mutual to this Court. *See Hallie*, 471 U.S. 34, 42 n.5. Further, even as to First Health, the Petitioners never presented the due process issue in the Fifth Circuit. Rather, the Petitioners challenged the injunction as lacking specificity in purported violation of Federal Rule of Civil Procedure 65. *See* Pet. at 13a-14a (Fifth Circuit's opinion discussing argument presented by Petitioners). As such, the Petitioners' due process argument is waived. *See Hallie*, 471 U.S. 34, 42 n.5.

In any event, the Petitioners' argument is meritless, for the Petitioners seemingly have confused their due process rights with those of the unidentified payors. The Petitioners received notice that the unidentified payors were to be included; in fact, First Health, in seeking the January 2008 injunction, expressly indicated that was its intent. The Petitioners thereafter fought tooth and nail regarding notice and to prevent an injunction. Indeed, this Petition is an example of the vigor with which the Petitioners opposed the injunction. If anything, it is the unidentified payors who may not have received any notice that they would benefit from the injunction. The payors, however, have not petitioned this Court for review, and obviously would not, and have not, complained about the injunction.

CONCLUSION

Liberty Mutual sought and obtained a permanent injunction against the Petitioners following nearly four years of litigation. Though the Petitioners chose not to appeal that portion of the injunction in favor of Liberty Mutual and instead limited their appeal to the portion in favor of First Health, now that the Fifth Circuit has affirmed the injunction, the Petitioners in this Court launch several unmerited attacks in Liberty Mutual's direction. Such a tactic should not be countenanced, much less be sufficient to warrant this Court's review.

On the merits, the lower courts correctly applied applicable law in finding they had subject matter jurisdiction, and in refusing to abstain. Because diversity jurisdiction exists, under *Horton*, jurisdiction existed notwithstanding any connection to workers' compensation laws. Moreover, because the *Trejo* factors are satisfied, and because there is no other adequate forum to hear Liberty Mutual's

claims, abstention would have been improper. The Petition should be denied.

Respectfully submitted,

JUDY Y. BARRASSO
Counsel of Record
EDWARD R. WICKER, JR.
STEPHEN L. MILES
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, LA 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701

Attorneys for Respondent, Liberty Mutual Insurance Company

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY	:	**DOCKET NO. 04-2405**
VS.	:	**JUDGE TRIMBLE**
DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL	:	**MAGISTRATE JUDGE WILSON**

AMENDED JUDGMENT

(Filed Apr. 12, 2006)

Pursuant to a telephone conference among the parties held on the March 21, 2006, regading [sic] the "Motion to Alter Judgment" (doc. #100), the Judgment rendered February 15, 2006 is hereby amended as follows:

For the reasons set forth in the Memorandum Ruling issued on February 15, 2006,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #79) filed by Liberty Mutual Insurance Co. is hereby **GRANTED** relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc.

#70) filed by First Health Group, Inc., is hereby **GRANTED IN PART,** to the extent that First Health does not owe Liberty Mutual indemnity for under-payments sought by Defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital against Liberty Mutual.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the court directs the entry of a Final Judgment as to the issues decided herein above pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court having determined that there are still remaining claims to be adjudicated, but no just reason for delay in the parties' right to appeal the issues decided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual's claim for attorney fees and damages will be deferred to a later date.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. #27) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is **DENIED** as **MOOT.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 12th day of ~~March~~ April, 2006.

/s/ James T. Trimble
JAMES T. TRIMBLE, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-30545

04-2405

LIBERTY MUTUAL INSURANCE CO

Plaintiff-Appellee

v.

CLARK GUNDERSON, Dr;
LAKE CHARLES MEMORIAL HOSPITAL

Defendants-Appellants

Appeals for the United States District Court for the Western District of Louisiana, Lake Charles

---

(Filed Oct. 3, 2006)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's motion to dismiss the appeals for lack of jurisdiction is **GRANTED**.

IT IS FURTHER ORDERED that appellee's alternative motion to stay briefing pending disposition of the motion to dismiss is **DENIED as unnecessary**.

IT IS FURTHER ORDERED that appellee's motion for an extension of time to file its brief until twenty (20) days after denial of the motion to dismiss is **DENIED as unnecessary**.